In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-870

GEORGE LAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the trial court erred in not defining "reasonable doubt," (2) that the jury was prejudiced by exposure to evidence later ruled inadmissible, and (3) that the grand jury that indicted him was improperly convened.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of unlawfully importing a controlled substance (cocaine) and of conspiring to commit that offense (21 U.S.C. 952a; 18 U.S.C. 2, 371). He was sentenced to concurrent one year prison terms. The court of appeals affirmed (Pet. App. A).

1. The evidence disclosed a venture involving petitioner, Richard Fox, Randy Fine, Larry Zaretsky, David Bennett, John DeCarolis, and Myrna Pierce, among others,

through which cocaine was smuggled into the country. Fox, Zaretsky, and Pierce all testified as government witnesses.[1]

Fox, accompanied by Fine, Zaretsky, and DeCarolis, visited Jamaica in April 1971. While there, Fox met petitioner, who asked if Fox would be interested in purchasing some cocaine. Fox later discussed this offer with Zaretsky and DeCarolis, who revealed knowledge of potential purchasers of the cocaine (Tr. 14-20). Fox then told petitioner that he was interested in making a purchase, but only if petitioner would have the cocaine delivered to Chicago and agree to be paid after its arrival. Petitioner agreed, and indicated that his girl friend, Pierce, would carry the drug to Chicago. Shortly before leaving Jamaica, Fox visited petitioner at his house and observed him packing a white powdery substance into a cosmetic case, which petitioner gave to Pierce along with two other plastic bags containing more of the powdery substance (Tr. 21-24, 102-103).

When Pierce arrived in Chicago, Fine came to her hotel and got the packages (Tr. 103). Later that day, Fox met Fine and Bennett at Susan Shamberg's apartment, where he saw the cosmetic case in the freezer. The next day Fox and Zaretsky took $5,000 in cash to Pierce (Tr. 27-28).[2] Fox and Zaretsky then returned to the Shamberg apartment, where they observed DeCarolis take the powder from the cosmetic case, mix it with lactose, and divide it into one ounce bottles (Tr. 29-32).

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[1]Bennett, Fine, Fox, and Zaretsky were also indicted on drug charges and pleaded guilty.

[2]Bennett later flew to Jamaica at the behest of Fox and Zaretsky and delivered another $10,000 to petitioner.

A few days later, Zaretsky told Fox to give him an ounce of cocaine, stating that he had secured a potential buyer. Fox testified that he then went to his father's building, obtained a one ounce bottle, and gave it to Zaretsky (Tr. 33-34). Zaretsky testified that he sold it to an individual later identified as Special Agent Aldo Aurilio for $1,000. Zaretsky also stated that he later sold a larger package of cocaine to Agent Aurilio for $11,000 (Tr. 72-75).

During the trial, Agent Aurilio corroborated Zaretsky's testimony that he had made two purchases from him. The packages were introduced as government exhibits, and a chemist testified that they contained cocaine. The trial court, however, sustained an objection to the admission of these two exhibits and also struck the testimony of Aurilio and the chemist on the grounds that the government had not established that the substance that petitioner had allegedly caused to be imported was the same substance that Zaretsky later sold to Aurilio (Tr. 154-195). The court declined to declare a mistrial; instead, it admonished the jury to disregard the testimony and proposed exhibits (Tr. 195).

2. Petitioner first argues that the district court erred in declining to define the term "reasonable doubt." The position of the district court in this regard was that

> * * * in a criminal case, we start with the defendant's presumption of innocence, and we proceed to the overcoming of that presumption of innocence beyond a reasonable doubt. I believe that it minimizes beyond a reasonable doubt or dilutes it to undertake to define it. ([Pet. App. A, A13.])

Accordingly, the court in its instructions to the jury, while not defining reasonable doubt, emphasized that in a criminal case the defendant is presumed innocent and that the burden of proving the defendant guilty beyond a

reasonable doubt rests always with the government.[3] The court of appeals also determined that providing a definition of the basic term "reasonable doubt" could add little to the jury's understanding. "Because of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion" (Pet. App. A, A17). This, it seems to us, is correct. And while this Court has not directly ruled on the issue, it has stated in dicta that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Miles* v. *United States*, 103 U.S. 304, 312. See also *Holland* v. *United States*, 348 U.S. 121, 141; *Dunbar* v. *United States*, 156 U.S. 185, 199.

Nor is review by the Court warranted because of a difference among the lower courts, for, in fact, no "active" conflict exists. As the decision below noted, the more recent statements of courts of appeals suggesting that a definition must be provided have themselves been dicta for in each of those cases, for the trial courts involved did attempt to explain the term. *Friedman* v.

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[3]The court instructed (Tr. 251):

> The burden of proving the defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial.
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> A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial unless and until he is proved guilty of the crime charged by credible evidence beyond a reasonable doubt.

Petitioner had submitted a long instruction which, among other things, required proof to a "moral certainty." The district court properly found the instruction inaccurate and argumentative. Pet. App. A, A11-A12. The district court also declined to give a prosecution instruction on reasonable doubt. *Id.* at A12-A13.

United States, 381 F.2d 155, 160 (C.A. 8); *Williams* v. *United States*, 271 F.2d 703, 705 (C.A. 4).[4] *United States* v. *Pepe*, 501 F.2d 1142, 1143 (C.A. 10); see also *Holland* v. *United States*, 209 F.2d 516, 522-523 (C.A. 10). Only in a few older decisions, whose precedental value on this question is doubtful, have reversals been ordered for failure to provide a definition. See *Blatt* v. *United States*, 60 F.2d 481 (C.A. 3); *Nanfito* v. *United States*, 20 F.2d 376 (C.A. 8); *Schencks* v. *United States*, 2 F.2d 185 (C.A. D.C.).[5] There thus is no present conflict between the circuits and, in any event, this question of judicial technique is not one that demands uniformity.

3. Petitioner next argues that the trial court erred in failing to declare a mistrial after striking the testimony of Aurilio and the chemist and declining to admit the two government exhibits. This contention was fully considered and rejected by the court of appeals (Pet. App. A, A4-A7) which pointed out (*id.* at A5-A6):

> Moreover, the testimony of Aurilio was merely cumulative in that Zaretsky had testified about the sales of packages to Aurilio. The defendant did not dispute that these sales had taken place. In addition, the jury had heard extensive and undisputed testimony regarding Lawson's role in initiating the sale to Fox

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[4]In a subsequent case, the Fourth Circuit determined that, in the absence of a timely objection, the failure to define "reasonable doubt" did not constitute "plain error" under Rule 52, Fed. R. Crim. P. See *United States* v. *Quinn*, 315 F.2d 425 (C.A. 4).

[5]Recent opinions of state courts reflect a majority supporting the trial court's position that a definition of the term is not required. See *People* v. *Robinson*, 21 Ill. App. 3d 343, 315 N.E. 2d 95 (1974); *State* v. *Wirsen*, 214 Kans. 525, 520 P.2d 1204 (1974); *Orrill* v. *State*, 5[illegible] 2d 930 (Okl.) 1973 Ct. of Crim. App.,; *Bentley* v. *State*, [illegible].2d 203 (Wyo. Sup. Ct., 1972); *State* v. *Taylor*, 128 Ga[illegible], 170 S.E. 2d 281 (1969); Contra: *State* v. *Holm*, 93 Id[illegible] 478 P.2d 284 (1970); *Commonwealth* v. *Young*, 317 A[illegible] Pa. Sup. Ct., 1974).

> and in directing Myrna Pierce to bring the substance to Chicago. We also note that the district judge admonished the jury during the trial to disregard the exhibits and the testimony of Aurilio and Cunningham. In its final instructions, the court again told the jury to consider only properly admitted evidence in reaching their verdict. [Citation omitted.] Finally, we note that there is no indication that the Government was acting in bad faith in presenting the testimony of Aurilio and Cunningham or in seeking to have the exhibits admitted into evidence. [Citation omitted.]

In our view, this evidence, fully subject to cross-examination, should have been admitted for the jury's consideration as corroboration of the testimony of the various witnesses (see Pet. App. A, A9). But having succeeded in excluding it, the defendant received all the benefit he was due. And, as the court pointed out (*ibid.*) there was sufficient other evidence to sustain the jury's verdict.[6]

4. The indictment charging petitioner was returned by the third of four Special Grand Juries in the Northern District of Illinois. Petitioner argues that the indictment was void because the enabling provision of the Organized

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[6] *Bruton* v. *United States*, 391 U.S. 123, cited by petitioner, is readily distinguishable. There, a confession implicating the defendant by a co-defendant who did not testify, was introduced at trial as evidence against the co-defendant. This admission was held reversible error, even though the jury had been instructed to ignore the confession insofar as it implicated the defendant. In reversing, this Court noted that the evidence in question "added substantial, perhaps even critical, weight to the Government's case" (*id.* at 128), and that the defendant who made the confession did not testify. In petitioner's case, however, the testimony ultimately struck was subject to cross-examination and had previously been corroborated by the testimony of petitioner's co-conspirators.

Crime Control Act of 1970 authorizing such Special Grand Juries (Pub.L. 91-452, Title I, §101(a), 84 Stat. 923, 924) permits no more than two special grand juries per district. Petitioner finds this limitation in the language of 18 U.S.C. 3332(b), which provides:

> Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

Such a restrictive reading of the statute is unwarranted, and as the court below noted, it would serve only to "thwart the purpose of the Act to limit to two the number of Special Grand Juries in a district when in fact four or five were necessary for adequate investigation of organized crime" (Pet. App. A, A7, quoting *Korman* v. *United States*, 486 F.2d 926, 934 (C.A. 7)). Moreover, the specific legislative history of the Organized Crime Control Act of 1970 shows that "[t]he purpose of these provisions is to make available *a sufficient number of grand juries* in each judicial district to accommodate the general needs of the district and the special needs of the typically lengthy organized crime case." H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 39 (emphasis added).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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